Supreme Court, U.S.
MOTION FILED

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Case No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,

Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE WILLIAM D. ARAIZA AND OTHER LAW PROFESSORS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE

Amici respectfully request leave to file the attached amicus brief in support of petitioners. *Amici* sought each party's consent to the filing of this brief. Because consent has not yet been received from respondents, *amici* submit this motion.

Amici are professors who study, teach, and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state, or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review.

Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional or administrative law. *Amici* represent a wide range of experiences, backgrounds, and philosophical perspectives. But *amici* are unanimous in the view that the sweeping grant of waiver authority to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

For these reasons, *amici* request leave to file the attached amicus brief.

Respectfully submitted,

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STATEMENT

William D. Araiza and the other professors of constitutional and administrative law listed herein respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICI*

Amici are professors who study, teach, and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state, or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory

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[1] No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. Counsel for each party received timely notice of *amici*'s intent to file this brief. Because consent has not yet been received from respondents, this brief is accompanied by a motion for leave.

authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review. Given that the agency at this moment is wielding the waiver power conferred upon it by Section 102 without constraint, this case squarely presents the fundamental question of whether the Constitution allows Congress to grant unlimited, unfettered, and unreviewable power to an executive branch official to waive any law when he or she deems it "necessary" to accomplish a stated goal. For this reason, *amici* believe this case warrants the Court's review.

Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional or administrative law. *Amici* represent a wide range of experiences, backgrounds, and philosophical perspectives. But *amici* are unanimous in the view that the sweeping grant of waiver authority to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

Amici submit this brief in their individual capacities. A list of the *amici* is attached to this brief as the Appendix.

STATEMENT OF THE CASE

Section 102(c) of the IIRIRA directs the Secretary of Homeland Security to take such actions as may be necessary to install physical barriers and roads (including the removal of obstacles to the detection of illegal immigrants) in the vicinity of the United States border. To achieve this end, Section 102(c)(1) provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This delegation of authority to an executive agency to waive any law or legal requirement, whether federal, state or local, is unprecedented. Certainly a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances. But such delegations have typically involved directions to the executive to waive particular provisions of laws. Moreover, such directions usually instruct or authorize the executive to waive only provisions of the same law containing

the waiver authority itself, and such waivers usually are subject to judicial review.

Here the delegation, while limited as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as *amici* can determine, Congress has never delegated to a federal agency anything approaching such an omnibus waiver authority.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge. Section 102(c) of IIRIRA, by contrast, gives the Secretary of Homeland Security the authority to waive rules and regulations in every area of the law, far outside his department's specialized knowledge and expertise, and regardless of what those with specialized knowledge and expertise have concluded is necessary and appropriate when developing the rules and regulations waived. This delegation is uniquely suspect in that it allows the Secretary to waive selectively and without reason not only substantive but procedural statutes, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA").

The Secretary's exercise of the Section 102(c) waiver delegation has been as unfettered in practice as it is unlimited in authorization. On September 22, 2005, the Secretary invoked his authority under IIRIRA § 102(c) to waive "in their entirety," along a

14 mile stretch of the U.S. border with Mexico near San Diego, "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the entirety of the APA, and six other environmental and historic preservation statutes. 70 Fed. Reg. 55,622 (Sept. 22, 2005). On January 19, 2007, the Secretary invoked his Section 102(c) authority to waive in Arizona's Barry M. Goldwater Range "all Federal, State or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the APA and eight other statutes. 72 Fed. Reg. 2,535 (January 19, 2007).

On October 26, 2007, the Secretary invoked his authority under Section 102(c) of IIRIRA to waive in the San Pedro Riparian National Conservation Area "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA. He asserted that the waiver of these laws was "necessary ... to ensure the expeditious construction of the barriers and roads," but he provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007).

On April 3, 2008, the Secretary issued a sweeping waiver covering 470 miles of the border from California to Texas. Invoking his authority under Section 102(c) of the IIRIRA, the Secretary waived "all federal, state, or other laws, regulations and

legal requirements of, deriving from, or related to the subject of" 30 laws, again including NEPA, other federal environmental laws, and the entirety of the APA.[2] Secretary Chertoff asserted that the waiver of these laws, in their entirety and across much of this nation's Mexican border, is "necessary ... to ensure the expeditious construction of the barriers and roads." The Secretary provided no explanation of why he found it "necessary" to waive all provisions of 30 statutes including, for instance, the Religious Freedom Restoration Act (42 U.S.C. § 2000bb) prohibiting the federal government from substantially burdening a person's exercise of religion. 73 Fed. Reg. 19,078 (April 8, 2008).

Also on April 3, 2008, the Secretary issued a waiver covering a 22 mile stretch in Hidalgo County, Texas. The Hidalgo County waiver is identical in scope to the Secretary's other April 3, 2008 waiver. 73 Fed. Reg. 19,077 (April 8, 2008).[3] These two waivers gave rise to the instant litigation.

To date, the Secretary has seen fit to waive laws protecting the environment, public health, freedom of religious exercise, and historic resources. But with no more than the unsupported assertion of "necessity" that he has invoked to waive those laws, the Secretary also may waive any other law he desires. He is equally free to waive the requirements of the Fair Labor Relations Act to halt a strike, or

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[2] This waiver was corrected on April 8, 2008 to include geographical information on the project areas.

[3] This waiver, too, was corrected on April 8 to describe the project area.

the provisions of the Occupational Safety and Health Act ("OSHA") to force workers to endure unsafe working conditions, or the state speed limits in California, New Mexico, Arizona and Texas to race equipment and materials to construction sites. Section 102(c) gives the Secretary the power to waive treaties with Mexico governing the location of the border, management of the border zone, and movement of water, goods, and services across the border so long as he deems it, in his sole and unreviewable discretion, "necessary." Indeed, under Section 102(c) the Secretary could waive immigration laws and regulations, hire illegal aliens, subject them to workplace conditions prohibited by OSHA and pay them less than the minimum wage if he deems it necessary to build the fence.

It also bears noting that the Secretary has specifically waived all state and local laws relating to the subjects of the 30 federal laws named in his waivers. This includes all state and local laws dealing with the environment, water and riparian rights, historic preservation, Native American religious freedom and practices, and other subjects.

SUMMARY OF ARGUMENT

The assurance of judicial review has been at the heart of this Court's review of constitutional challenges to Congressional delegations of power. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Mistretta v. United*

States, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944). However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "longstanding principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions *such that a court could ascertain* whether the will of Congress has been obeyed..." be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 218-19 (emphasis added; internal quotation marks omitted). The Court has never answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers.

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying 30 statutes and all rules, regulations, and

legal requirements deriving from or related to the subject matter of those statutes along much of the border with Mexico. Among other laws, almost every federal environmental and historic preservation statute has been waived, as have the Religious Freedom Restoration Act and the Administrative Procedure Act.

The Secretary has asserted that these sweeping waivers are "necessary" but, contrary to what normally might occur in the context of reviewable agency action, has offered no reasons why. None of these waivers can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[4] Neither this Court nor any court of appeals has ever been asked to review a delegation to suspend statutory requirements that is this far-reaching, nor has any court ever upheld as broad a delegation of legislative power to the executive branch in the absence of judicial review.

The Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review. In addition, the Court may wish to take this opportunity to consider whether there are circumstances under which the Congressional delegation must be subjected to greater scrutiny, such as when a delegation is especially broad or when an agency is permitted to waive laws that are outside the scope of its expertise. The unrestricted grant of power to an unelected

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[4] The statute also precludes any right of appeal to the courts of appeals following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

official to waive any law on the books when he deems it "necessary" for his purposes, including not only substantive laws but also procedural statutes, raises the specter of arbitrary power and the loss of liberty. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). A writ of certiorari should issue.

ARGUMENT

I. A Writ of Certiorari Should Issue to Consider Whether Exceptionally Broad Delegations to Unelected Members of the Executive Branch Require the Availability of Judicial Review.

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations. After vesting exclusive jurisdiction in the district courts, section 102(c)(2)(A) of the statute sharply limits that jurisdiction:

> A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby,*

500 U.S. at 168-69; *Skinner*, 490 U.S. at 218-19; *Mistretta*, 488 U.S. at 379; *Yakus*, 321 U.S. at 436. The IIRIRA's prohibition of judicial review in the context of a grant of exceptionally broad authority presents a critical question warranting a grant of certiorari.

The Court has described as "longstanding" the principle that Congress can delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed." *Skinner*, 490 U.S. at 218 (internal quotation marks omitted). The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law rather than making it. *Chadha*, 462 U.S. at 953 n.16.

The Court's non-delegation analyses reveal the importance of judicial review. In *Touby v. United States*, for example, the Court rejected the argument that the challenged statute was an unconstitutional delegation due to a purported lack of judicial review. Importantly, however, the Court did not deny the importance of judicial review to the constitutional question; rather it concluded that the statute did in fact provide for adequate judicial review. *See Touby*, 500 U.S. at 168-69. Concurring, Justice Marshall explained the reason for this longstanding concern with judicial review: "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Id.* at 170 (Marshall, J., concurring).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. 8, 28-29 (1835); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Therefore, our "constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates...." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption that agency action is subject to judicial review. *Abbott Laboratories v.*

Gardner, 387 U.S. 136, 140 (1967). [5] That presumption, and the reasons for it, underlie the non-delegation doctrine's concern for judicial review as expressed in cases such as *Touby*, *Skinner*, *Mistretta* and *Yakus*. As an influential lower court opinion explained, "Concepts of control and accountability define the constitutional requirement [of non-delegation]." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel). [6]

The Court has recognized the importance of judicial review when distinguishing at the most basic level between legislative action reserved to Congress and policymaking that can appropriately

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[5] When Congress intends to preclude judicial review, the Court has required Congress to do so with "specific language or specific legislative history that is a reliable indicator of congressional intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986), *superseded by statute*, Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 1395ff (1992). "[C]lear and convincing evidence" is required to overcome the "strong presumption that Congress did not mean to prohibit all judicial review." *Bowen*, 476 U.S. at 671-72.

[6] One scholar has connected judicial review of agency action and non-delegation as follows: "Framed as a sort of presumption, the notion was that [judicial] review was necessary to assuage concerns over the constitutionality of the New Deal regulatory statutes. Review was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions." Daniel D. Rodriguez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743, 755 (1992). This statement does not contemplate the situation present in this case, where a constitutionally troubling delegation comes unaccompanied by judicial review.

be delegated to administrative agencies. In *Chadha* the Court, distinguishing lawmaking (which requires adherence to bicameralism and presentment) from administrative action (which does not), relied on the limitations constraining administrative action, limitations that assumed the existence of judicial review:

> The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it – a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by [the Immigration and Nationality Act] involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States,* 321 U.S. 414, 425, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944), and can enforce adherence to statutory standards. *It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.*

Chadha, 462 U.S at 953 n.16 (1983) (emphasis added; citations omitted).

Presaging *Chadha*, an influential lower court judge similarly noted that "Congress has been willing to delegate its legislative powers broadly – and courts have upheld such delegation – because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). By contrast, an excessively broad waiver provision that does not require the Secretary to provide reasons, and whose invocation is not subject to judicial review, prevents any assessment of congressional will or whether that will is being followed. The "control and accountability" that underlie "the constitutional requirement" of non-delegation, *Amalgated Meat Cutters*, 337 F. Supp. at 476, are thwarted when a denial of judicial review precludes enforcement of the legislative will. As one court concluded, were this linkage broken "the law governing delegation would also become little more than formalistic mutterings, for it makes little sense to require that the legislature articulate intelligible standards to govern agency action if realistic inquiry into whether those standards are being followed were foreclosed." *City of Chicago v. Federal Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1972). *See also, e.g., Nat'l Ass'n of Patients on Hemodialysis and Transplantation v. Heckler*, 588 F. Supp. 1108, 1116-17 (D.D.C. 1984) ("The complete absence of judicial oversight over an entire regulatory program would raise a serious constitutional issue concerning an improper delegation of legislative power to the Executive.").

Beyond ensuring basic fidelity to statutory commands that have complied with Article I, judicial review of agency action also helps guard against arbitrary use of discretion in implementing statutes. *See Clinton*, 524 U.S. at 489 (Breyer, J., dissenting); *United States v. Pastor*, 557 F.2d 930, 941 (2d Cir. 1977) ("The procedures prescribed by Congress for regulation of the [administrator's conduct], coupled with the availability of judicial review . . . assure that the delegatee will not act capriciously or arbitrarily. The delegation is therefore constitutionally valid."). When Congress delegates broad authority that could support a range of different agency decisions, and the legislative directive thus cannot provide fully sufficient guidelines, judicial review protects "the coherence and the integrity of the legislative process." Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985). Indeed, even the mere availability of judicial review plays this salutary role, as "the prospect of review increases the likelihood of fidelity to substantive and procedural norms." *Id.* Judicial review of discretionary agency action is especially important given agencies' lack of direct electoral accountability. *Cf. Clinton*, 524 U.S. at 490 (Breyer, J., dissenting) (distinguishing on this basis between the importance of judicial review of presidential discretion and review of agency discretion).

For these reasons, it is hardly surprising that the absence of judicial review has been a significant consideration on the limited occasions when this Court has found that statutes violate the non-delegation principle. *A.L.A. Schechter Poultry Corp.*

v. United States, 295 U.S. 495, 533 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935). Indeed, delegations without judicial review have only been upheld when they have not raised serious separation of powers issues. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985) (authority to the Food and Drug Administration to bring enforcement actions under the Food, Drug and Cosmetic Act where judicial review was appropriately precluded given the law-enforcement nature of the authority); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958) (authority to Panama Canal Company to set Panama Canal tolls where judicial review was appropriately declined given the lack of legal standards controlling the agency's action). By contrast, in cases raising non-delegation concerns the Court has taken pains to note both the existence of judicial review and, indeed, the adequacy of the particular judicial review provisions. *See, e.g., Touby*, 500 U.S. at 168-169.

The petition for certiorari raises important questions, so far unanswered by the Court, about the necessity of judicial review to the constitutionality of exceptionally broad delegations of congressional power. As described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. *See, e.g., Touby*, 500 U.S. at 168-69; *Skinner*, 490 U.S. at 218-19; *Chadha*, 462 U.S. at 953 n. 16; *Yakus*, 321 U.S. at 425. Yet members of the Court have raised questions about this principle. In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit

after the Solicitor General had effectively conceded that the challenged agency action was subject to judicial review. However, the dissenting opinion appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). The uncertainty on this fundamental issue has been noted by the lower courts. *See, e.g., United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"), *vacated on other grounds*, 543 U.S. 1097 (2005); *compare also United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993), *with United States v. Hovey*, 674 F. Supp. 161, 164 & n.9 (D. Del. 1987) (citing cases that upheld Sections 811 and 812 of the Controlled Substances Act against a non-delegation challenge based in part on the availability of judicial review) *and Nat'l Ass'n of Patients on Hemodialysis*, 588 F. Supp. at 1116-17 ("The complete absence of judicial oversight over an entire regulatory program would raise a serious constitutional issue concerning an improper delegation of legislative power to the Executive.").

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA effects a nearly unprecedented delegation of authority to waive any "legal requirement[]" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those

waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively and without real explanation. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

II. Section 102(c) Raises Profound Questions Concerning the Power of Congress to Delegate Its Power to Nullify a Law.

Section 102(c) endows the Homeland Security Secretary with a core Article I power to amend statutes by limiting the extent of their force and effect. U.S. Const. art. I, § 1. The nullification of a statute is a quintessentially legislative function. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437-441 (1992). Congress has delegated this function to an agency on prior occasions, but such delegations have only authorized the agency to waive a legal provision upon the occurrence of specified events, or upon the making of specified determinations. Section 102(c) is unprecedented in the breadth of its waiver authority. Section 102(c) is not analogous to statutes that impose a rule of conduct but then authorize the agency to waive that rule under certain circumstances. Instead, Section 102(c)'s waiver authority is freewheeling, extending to any "legal requirement" in force. The breadth of Section 102(c)'s authority has already been remarked upon. What is significant here is the fact that this authority is not linked to the original grant of power – *i.e.*, the

original rules of conduct the agency is empowered to implement.

This decoupling raises the question of whether Section 102(c) is functionally indistinguishable from the line item veto that the Court struck down in *Clinton v. City of New York*. The *Clinton* Court was rightly concerned that what emerged from the President's exercise of his powers under the Line Item Veto Act – "truncated versions of two bills that passed both Houses of Congress" – were "not the product of the 'finely wrought' procedure that the Framers designed." *Clinton*, 524 U.S. at 440. So too the waivers resulting from the Secretary's exercise of his Section 102(c) powers modify statutes in disregard of the "single, finely wrought and exhaustively considered, procedure" set forth in the Constitution. *Chadha*, 462 U.S. at 951. If that constitutional procedure does not contemplate the President performing the functional equivalent of partially repealing statutes, it surely does not contemplate such conduct by an unelected executive branch officer. The repeal, even partial, of a legislative enactment is itself a uniquely legislative act. *Chadha*, 462 U.S. at 954 (repeal of statutes, no less than enactment, must conform with Art. I).

It is no answer to contend that the Secretary's repeal power is only partial. For the geographic areas, the circumstances, and the time frames decided upon by the Secretary, the target laws are a nullity.

At a minimum, Section 102(c) raises the question of whether the legislative authority to repeal or

modify any legal requirement of any and every sort can be delegated to an unelected executive branch official. The Secretary's actions to date pursuant to Section 102(c) directly frame this question for the Court. This case presents the Court with the opportunity to delineate whether such a delegation can ever be constitutional and, if so, to demarcate its outer constitutional bounds.

"[L]iberty demands limits on the ability of any one branch to influence basic political decisions." *Clinton*, 524 U.S. at 450-51 (Kennedy, J., concurring). Quoting Montesquieu, the Federalist made the point as follows:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961), *quoted in Clinton*, 524 U.S. at 451 (Kennedy, J., concurring). A writ of certiorari should issue to determine whether Section 102(c) violates the principles of separation of powers by unconstitutionally delegating legislative power to the Secretary of Homeland Security.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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